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90-1941

Supreme Court, U.S.
FILED
JUN 19 1991
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In The

Supreme Court of the United States

October Term, 1990

MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KAULUKUKUI, SR., MOSES KEALE, SR., and KEVIN MAHOE,

Petitioners,

vs.

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually and in his capacity as member of the elder council of the HOU HAWAIIANS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a suit filed pursuant to 42 U.S.C. § 1983 against state officials which seeks monetary relief for alleged acts and omissions performed in public office and under color of state law, and in which the complaint makes no mention of the capacity in which the officials are sued, a District Court reviewing the complaint does not commit reversible error in refusing to assume that the complaint seeks monetary relief against the state officials in their individual capacities?

2. Whether, given the vague allegations of the complaint and the state of federal law, the court of appeals, which reinstated Respondents' 42 U.S.C. § 1983 civil suit against certain Trustees and former Trustees of the Office of Hawaiian Affairs as an individual-capacity action for damages based on alleged violations of asserted federal statutory duties which the court found were actionable under the "and laws" provision of § 1983, erred in refusing immediately to grant Petitioners' defense of objective qualified immunity under the rule of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny?

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No. 90-___

In The

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October Term, 1990

MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KAULUKUKUI, SR., MOSES KEALE, SR., and KEVIN MAHOE,

Petitioners,

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DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually and in his capacity as member of the elder council of the HOU HAWAIIANS,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Moanikeala Akaka, Rod Burgess, Clarence Ching, Frenchy DeSoto, Louis Hao, Manu Kahaialii, Thomas Kaulukuku, Sr., Moses Keale, Sr., and Kevin Mahoe, who are Trustees and former Trustees of the Office of Hawaiian Affairs, State of Hawaii, respectfully pray that a writ of certiorari issue to review the opinion

and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on September 25, 1990, as amended March 21, 1991, on the denial of the petition for rehearing and rejection of *en banc* review.

Petitioners advise the Court that, in light of the grants of review in *Hafer v. Melo*, No. 90-681 (U.S. cert. granted Feb. 25, 1991), and *Suter v. Artist M.*, No. 90-1448 (U.S. cert. granted May 13, 1991), the Court may wish to hold this Petition pending the dispositions in those cases, which may bear on the answers to Questions 1 and 2 of this Petition, respectively.

In addition, this Petition is related to the Petition in *Paty v. Napeahi*, No. 90-___ (U.S. filed June 18, 1991).

OPINIONS BELOW

The original opinion of the Court of Appeals for the Ninth Circuit is reported at 915 F.2d 469. The amended opinion of the Court of Appeals and its order denying rehearing are reported at 928 F.2d 824, and are reprinted in Appendix ("App.") "A."

The District Court's Order Granting Defendants' Motion to Dismiss is not reported and is reprinted in App. "B." The related opinion of the Hawaii Supreme Court in *Trustees of the Office of the Hawaiian Affairs v. Yamasaki*, is reported at 69 Haw. 154, 737 P.2d 46, *cert. denied*, 484 U.S. 898 (1987).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered September 25, 1990, and a timely petition for rehearing and suggestion of the appropriateness of rehearing en banc was filed on October 9, 1990, and denied on March 21, 1991. The time in which this Petition may be filed therefore extends to and includes June 19, 1991, and this Petition is timely. Jurisdiction in the District Court was alleged to have been conferred pursuant to 28 U.S.C. §§ 1331 and 2201. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the United States Code provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any Citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 5 of the Hawaii Admission Act, Pub. L. 86-3, 73 Stat. 4, 6 (1959), provides in pertinent part that

> (f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under

> subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. . . . .

Sections 4, 5, and 6 of the 1978 Hawaii Constitution and Chapter 10, Haw. Rev. Stat. (1985), provide in relevant part:

> Haw. Const. art. XII, § 4: The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.
>
> Haw. Const. art. XII, § 5: There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office

of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from among its members.

Haw. Const. art XII, § 6: The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Haw. Rev. Stat. § 10-3 (1985). The purposes of the office of Hawaiian Affairs include: (1) The betterment of native Hawaiians. A pro rata portion of all the funds derived from the public land trust shall be funded in an amount to be determined by the legislature for this purpose, and shall be held and used solely as a public trust for the betterment of the conditions of native Hawaiians. For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the

Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e).

Haw. Rev. Stat. § 10-13.5 (1985): Twenty per cent of all funds derived from the public land trust, described in section 10-3, shall be expended by the office, as defined in section 10-2, for the purposes of this chapter.

STATEMENT OF THE CASE

This case arises from the State of Hawaii's efforts, through its constitutional convention and statutes, to give autonomy and hope to the descendants of the original inhabitants of the Hawaiian Islands, by establishing an Office of Hawaiian Affairs ("OHA") and endowing that Office with financial resources with which to minister to and aid persons of Hawaiian ancestry who for too long have been neglected in their own land.

Despite these efforts, in October, 1988, two individuals claiming to represent themselves and Hawaiian groups, sued in the United States District Court for the District of Hawaii, under 42 U.S.C. § 1983, claiming the

Trustees of the Office of Hawaiian Affairs then in office had breached their fiduciary duties by failing to comply with duties claimed to derive from "trust law" and, in other respect, by allegedly violating the state statutes which gave rise to OHA. The claimed federal basis for these claims was that certain monies entrusted to OHA by operation of the state constitution and statutes derive from the "public trust lands" conveyed to Hawaii upon its admission to the Union, and subject to the constraints of § 5(f) of Hawaii's Admission Act. In addition to alleging breaches of state law, Respondents also alleged that Petitioners had used this 5(f) trust income "for uses and purposes other than those purposes permitted by § 5(f) of the Admission Act." None of the complaint's operative allegations, particularly those relating to the breach of § 5(f), *simpliciter*, contained specific information of what had been done or not done to cause the breach, and all were tendered "on information and belief." Nowhere in the complaint did Respondents state that they were seeking to sue the Trustees in their individual capacities. The principle questions on this Petition are whether the Court of Appeals for the Ninth Circuit was correct in holding that Petitioners had even been properly named in their individual capacities, and, if so, whether Petitioners should not have immediately been granted dismissal on the basis of a clear defense of qualified immunity.

1. The Office of Hawaiian Affairs, and numerous other Departments and programs in the State of Hawaii, derive substantial resources from what are known as Hawaii's public trust lands. These lands, in excess of 1.3 million acres, were originally transferred to the United

States by the Republic of Hawaii at the time of annexation in 1898, subject to the condition that "existing laws of the United States relative to public lands" would not apply. *See* the Joint Resolution to Provide for Annexing the Hawaiian Islands, Resolution of July 7, 1898, 30 Stat. 750 (1898). The United States agreed that "all revenue from or proceeds of [said lands,] except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* These obligations to the residents of Hawaii were confirmed in section 91 of the Organic Act, Act of April 30, 1900, 31 Stat. 141 (1900), which, among other things, granted the Territory authority to "maintain, manage, and care for" the ceded lands not reserved for national purposes by Congress or the President, and required any rents or consideration earned by the United States by disposition of ceded lands to private parties to be turned over to the treasury of the Territory for use in a variety of ways, *e.g.*, "public works, . . . highways, wharves, landings, harbor improvements, public buildings, or other public purposes." *Id.*

2. Section 5(f) of the Admission Act, 73 Stat. 6, recast the discretion granted Hawaii's local government by the Resolution of Annexation and the Organic Act. Public lands whose title at Statehood was not already in the Territory and to which the new State did not succeed under Section 5(a) of the Admission Act, and which, further, were returned under sections 5(b), (c), (d), and (e) of the Act, were left for disposition by the State for "one

or more" of five purposes: (1) "support of the public schools and other public educational institutions"; (2) "betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended"; (3) "development of farm and home ownership on as widespread a basis as possible"; (4) "making of public improvements"; and (5) "provision of lands for public use." Congress provided that only a failure to manage and dispose of lands reverting under sections 5(b), (c), (d), and (e) "for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide" would be "a breach of trust."

3. Tremendous growth of the value of the section 5(f) corpus, fueled by rising real estate prices, tourism, and development, and the broad discretion afforded by Congress, has led to intense debate among those who, in the first instance, frame "the constitution and laws" and give content to the trust – Hawaii's voters and their chosen elected officials. In 1978, Hawaii's constitutional convention recognized that "the Section 5(f) trust created two types of beneficiaries and several trust purposes one of which is [benefiting] native Hawaiians of one-half blood." I *Proceedings of the Constitutional Convention of Hawaii of 1978* 644 [hereinafter cited as "*Proceedings*"]. The convention thus drafted for the voters what is now Article XII, § 4 of the Hawaii Constitution of 1978.

a. Article XII, § 4 carves out of the general corpus of section 5(f) trust proceeds a distinct subset of beneficial interests – that arising out of "lands granted to the State of Hawaii by Section 5(b) of the Admission Act" – for "native Hawaiians and the general public." This was done primarily to promote administrative efficiency and

self-determination for native Hawaiians who take the benefit of such 5(f) proceeds as are allocated, as well as other benefits under law, such as those under the Hawaiian Homes Commission Act. *See* II *Proceedings* 458 (remarks of Del. Kaapu). The convention, however, did not define what part of the section 5(b) lands or the incidents of ownership appertaining thereto would constitute the corpus to be divided under Article XII. Rather, to fulfill its hopes for native Hawaiian self-determination, the convention created OHA as a vehicle for administering the allocations made. *See* I *Proceedings* 645; *see* Haw. Const. art. XII, § 6 (1978). Defining the "pro rata portion" of the Article XII trust to be given OHA was left to the Legislature. I *Proceedings* 1018; *see generally* II *Proceedings* 462; Haw. Const. art. XVIII, § 8 (1978).

4. Despite legislative action authorizing OHA, *see* the Act of June 7, 1979, ch. 196, § 2, 1979 Haw. Sess. L. 398, and defining, at "twenty percent," OHA's "pro rata share" of the trust corpus identified in the state constitution, *see* Act of June 16, 1980, 1980 Haw. Sess. L. 525, codified at Haw. Rev. Stat. § 10-13.5 (1985), the Supreme Court of Hawaii concluded, in 1987, that, due to the absence of " 'judicially discoverable and manageable standards,' " suits by OHA to compel payment of monies OHA believed owed from the State were nonjusticiable. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 174, 737 P.2d 446, 458, *cert. denied*, 484 U.S. 898 (1987). Not until 1990 did the Legislature take further steps to provide "manageable standards" and resolve the "facial statutory inconsistencies" identified in *Yamasaki*. *See generally* the Act of July 3, 1990, Chapter 304, 1990 Haw. Sess. L. 947.

5. The action below was filed on October 18, 1988, by Dr. Nui Loa Price and Kamuela Price on behalf of themselves and two asserted Hawaiian groups, the "Hou Hawaiians" and the "elder council" of the Hou Hawaiians. Pet. App. 28-29. In relevant part the complaint alleged the OHA trustees in office at that time had breached their fiduciary duties with respect to revenue derived from public trust land conveyed under the Admission Act, by, allegedly, failing to hold such income "separate and apart from the other funds held by Defendants" and to "reinvest the income therefrom in a reasonably prudent manner toward the purposes and uses enumerated by Congress," and by expending public trust land funds "for uses and purposes other than those purposes permitted by § 5(f) of the Admission Act," "in particular," on "persons denominated as 'Hawaiians' who are persons of less than 50% Hawaiian ancestry." Pet. App. 32-33. Respondents prayed for "judgment against Defendants jointly and severally in an amount as shall be proven at trial." *Id.* at 33. Nowhere in the complaint did Respondents state that they sought relief against Petitioners in their individual capacities.

6. The District Court, on Petitioners' motion, dismissed the action, holding that the duties Respondents alleged were "imposed by state law as opposed to federal law," and were not actionable. Pet. App. 19-20. The court also found that a money remedy against the Trustees in their official capacity was barred by the Eleventh Amendment, and that Respondents had "not allege[d] liability for conduct in defendants' *individual* capacities." Pet. App. 22 (emphasis in the original).

7. The Court of Appeals reversed, in a decision by Circuit Judge Canby, joined by Circuit Judge Schroeder and District Judge Keep, sitting by designation. The court concluded that because the complaint could be read to allege that public trust land revenues were spent "on purposes other than those listed in § 5(f)," the complaint stated a claim under 42 U.S.C. § 1983 and the Ninth Circuit's decision in *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467 (9th Cir. 1984) ("*Keaukaha II*"), which allowed enforcement under § 1983 of § 5(f) of the Admission Act insofar as it related to the specific lands referred to in § 4 of the Admission Act, known as the Hawaiian homelands. Pet. App. 8-9. While it agreed that "the homelands and the income they produce" are "not at issue in this case," the court reasoned that the "source of the right Price asserts here is precisely the same as the source of the right claimed in *Keaukaha II*." Pet. App. 9. The court rejected Petitioners' claim that this was not an individual-capacity suit at all, because if it had not been, it would be barred by the Eleventh Amendment. Thus, because it "would have been inconsistent with the very nature of Price's claim" to deem the lawsuit one for official capacity relief, "since § 1983 applies only to deprivations of federal rights by 'persons,' and Hawaii is not a person under the statute," the court deemed Respondents to have pled properly, and reversed and remanded for further proceedings. Pet. App. at 10, citing, *inter alia*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989)). The court did not pass upon the defense of qualified immunity, even though, as found by the District Court, Respondents conceded in the District Court that Petitioners "have" such immunity as a defense. Pet. App. 22.

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals remanding Petitioners for further litigation in the District Court presents important and recurring questions concerning the expansive use of 42 U.S.C. § 1983 as a vehicle for enforcing alleged federal statutory rights by way of personal money judgments against state officials who, from the face of the pleadings served against them, cannot reasonably know if they even have been sued in their individual capacities, or, if they have, what specific acts are the asserted basis for piercing their qualified immunity. The judgment of the Court of Appeals for the Ninth Circuit directly conflicts with numerous decisions of three other Circuits that refuse to judicially re-write ambiguous complaints to spare litigants from the bar of the Eleventh Amendment, and independently poses a grave threat to the principles of deference, reflected in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and its progeny, to state officials acting in objective good faith in the face of shifting and uncertain standards of federal conduct.

In fact, coming in an area where deference to state management – management of lands entrusted to the States under their Admission Acts – has a substantial pedigree, the Court of Appeals' refusal to end this case on qualified immunity grounds is especially troubling. As Hawaiians who also serve as elected representatives of the Hawaiian people, Petitioners are sensitive to the importance of federal judicial review of state action, where that is appropriate. Nonetheless, because of the issues of procedural fairness surrounding the Ninth Circuit's summary conversion of this action into an individual capacity suit on appeal, and this Court's commitment

to the "protective" doctrine of qualified immunity, *see Burns v. Reed*, 59 U.S.L.W. 4536, 4541 (U.S. May 30, 1991), this Court should grant the petition and reverse the judgment of the Court of Appeals, with instructions either to affirm the judgment of the District Court or to entertain Petitioners' claim of qualified immunity. Because of the relationship of the issues here to those in *Hafer v. Melo*, No. 90-681 (U.S. cert. granted Feb. 25, 1991), and *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), the Court may wish to defer this Petition pending the dispositions there.

I. This Court Should Grant Review to Correct the Ninth Circuit's Presumption, which Directly Conflicts with that of Other Circuits, that Individual-Capacity Relief Has Been Sought Against State Officials Sued Under § 1983, When Those Officials are Sued for Monetary Relief.

It is a hallmark of Due Process that " 'in any proceeding which is to be accorded finality [that] notice [be] reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections.' " *Peralta v. Heights Medical Center, Inc.*, 484 U.S. 80, 84 (1988) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Constitutionally required notice must not only inform a party defendant of where and for what he is sued, but also in what *capacity* he is sued. *See Brandon v. Holt*, 469 U.S. 464, 472 n.20 (1985).

The Ninth Circuit's approach to this case flouts this rule by making the *capacity* in which a defendant is sued turn on a subjective assessment of the Plaintiff's intent to

file a "good" suit, and, more importantly, an assessment of what the particular Plaintiff might think is a "good" suit. Such an approach, however, could not be the law. While the Ninth Circuit sensed that Respondents would be out of court if they filed their case as an "official-capacity" action for damages, litigants might bring such suits for any number of reasons, such as the hope that a state statute might be found that waives the sovereign's immunity in federal court, or that this Court might, on further reflection, reconsider its ruling in *Hans v. Louisiana*, 134 U.S. 1 (1890). Applied consistently moreover to all civil litigation, the Court of Appeals' judgment would lead to sharply divergent, or, at best, confusing, results depending on whether Congress had abrogated an officer's "official capacity" immunity for the particular cause of action asserted. Thus under the Ninth Circuit's approach, causes of action would be presumed to be against Defendants in their "official capacity" if a congressional waiver existed, but not if the Eleventh Amendment's protections had been left intact. This intertwining of merits-determination and notice-giving aspects of the judicial process, however, is wholly antithetical to due process, which depends upon a litigant knowing, without regard to the substance of the underlying law, whether he is a party or is not.[1]

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[1] This is all the more true when, as is the case here, Petitioners may not even have been served as is required by Fed. R. Civ. P. 4(d)(1). *See* Summonses in Clerk's Record below (noting addresses of Petitioners as the official address of OHA).

Failure to reverse the court of appeals decision poses practical as well as constitutional difficulties, insofar as public officials are often legally mandated to tender lawsuits against them in their official capacities to the government's legal counsel. *See, e.g.*, Haw. Rev. Stat. § 28-1 (Attorney General appears, subject to exceptions, "in all cases criminal or civil in which the State may be a party"). Delay in the resolution of the capacity issue raises serious problems for both the Government and its officers, as pleading "intent" must be inferred from often-vaguely worded prayers. *See* Pet. App. at 33 (seeking not only monetary damages but "such other and further relief as may be warranted under the facts and law").

For this very reason, the Ninth Circuit's approach has been rejected by at least the Sixth, Seventh, and Eighth Circuits. Thus, under the Seventh Circuit rule, "[i]n the absence of any express statement that the parties are being sued in their individual capacities, an allegation that the defendants were acting under color of law generally is construed as a suit against the defendants in their official capacities only." *Yeksigian v. Nappi*, 900 F.2d 101, 104 (7th Cir. 1990); *see also Conner v. Reinhard*, 847 F.2d 384, 394 n.8 (7th Cir. 1988). In the Sixth and Eighth Circuits, a complaint must "specifically identify the capacity in which a defendant is being sued." *Melo v. Hafer*, 912 F.2d 628, 636 n.7 (3d Cir. 1990) (citing *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989); *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989)), *cert. granted*, No. 90-681 (U.S. Feb. 25, 1991). To the extent *Hafer* may well shed light on the "official capacity/individual capacity" issue here, it may well suffice to simply hold this Petition pending the disposition there. In any event, the Court should grant

this Petition to resolve the sharp conflict in the circuits on this basic matter of pleading practice, and procedure for giving required notice.

II. This Court Should Grant Review to Correct the Ninth Circuit's Refusal to Acknowledge Petitioners' Palpably Available Defense Based on Qualified Officer's Immunity.

Whereas the panel was quick to re-write Respondents' complaint to state an "individual-capacity" prayer, the panel was less than generous in perceiving the futility of the complaint, even postured as an effort to obtain personal judgments against Petitioners, in light of the "protective" doctrine of qualified immunity. *See Burns v. Reed*, 59 U.S.L.W. 4537, 4541 (U.S. May 30, 1991) (quoting *Malley v. Briggs*, 475 U.S. 335 (1985)); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). As this Court observed in *Siegert v. Gilley*, 59 U.S.L.W. 4465 (U.S. May 23, 1991), further proceedings, including discovery, should not be permitted if immunity turns upon a "purely legal question." *Id.* at 4467. Because the judgment below fundamentally conflicts with this admonition, and otherwise substantially conflicts with this Court's rulings, the writ of certiorari should be granted on this second ground.

Irrespective of the underlying facts, the immunity question in this case, as in *Siegert*, turns at the threshold on "purely legal question[s]." First, as the grant of certiorari in *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1990), indicates, the notion of federal liability even for injunctive relief under § 1983 for statutory wrongs is, at a broad level, in flux. Second, this is at least

true with respect to the applicability of § 1983 to Hawaii's Admission Act.

For example, prior to this suit, it was plainly open to reason, given OHA's contemplated role as an independent agency designed to support Hawaiian sovereignty, that a "disposition" of 5(f) trust land revenue to OHA would eliminate any *federal* obligation with respect to the transferred revenue. Whether the court of appeals was right or wrong in deciding this issue, *see* Pet. App. 7, Petitioners were not " 'plainly incompetent' " in believing that their actions (even crediting the allegations of the complaint) did not violate *federal* law. *See Burns v. Reed*, 59 U.S.L.W. at 4541 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1985)). As the District Court in this case ruled, the duties alleged to have been breached in this case were "created by state not federal law." Pet. App. 19-20. Again, whether the court of appeals was correct in overruling this conclusion, immunity should have been granted. *Compare Davis v. Scherer*, 468 U.S. 183, 193-97 (1984) (on the interrelationship of state to federal law for purposes of qualified *Harlow*-style immunity).

None of the Ninth Circuit's prior applications of § 1983 as a vehicle for enforcement of § 5(f) of the Admission Act gave rise to the sort of "clearly established" law necessary to generate personal liability for the Trustees of OHA. *See Keaukaha II*, 739 F.2d 1467 (9th Cir. 1984); *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985); *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990). Indeed, it is no small irony that the Trustees, who are charged with vindicating Hawaiian sovereignty, have been subjected to litigation when officials of the Executive Branch

of the State of Hawaii, as to whom the mandates of § 5(f) are more centrally addressed, have been summarily granted immunity. *See Price v. Hawaii*, 921 F.2d 950, 959 (9th Cir. 1990) (applying *Harlow* immunity). Petitioners' actions, even taking the conclusory allegations of the complaint as true, were "reasonable in light of current American law." *Anderson v. Creighton*, 483 U.S. 635, 646 (1987). Immunity is mandated. *See Siegert*, 59 U.S.L.W. at 4541.

The Ninth Circuit's refusal, in this case, to grant immunity on appeal reflects, in this respect, a doubly erroneous application of immunity precepts. First, while the Ninth Circuit's opinion stated that "[t]he source of the right claimed in *Keaukaha II*, namely § 5(f) of the Admission Act," "is precisely the same" as that here, Pet. App. 9, this Court has unequivocally held that, for liability to attach, "the right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant sense." *Anderson*, 483 U.S. at 640. Second, immunity should not await further litigation in the courts below where, as here, immunity turns on "purely legal" questions. *Siegert*, 59 U.S.L.W. at 4467. As this Court's *Siegert* decision strongly suggests, the panel erred in permitting this case to go forward in light of the "purely legal" questions that ought to have been answered under *Harlow*-style immunity *before* the "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit" are imposed.

Siegert, 59 U.S.L.W. at 4467. For these reasons alone,[2] granting the writ is warranted.

However, even if none of the foregoing provided a ground for dismissal, the court of appeals ought to have granted immunity under the "heightened pleading standard" which the court of appeals in *Siegert* employed, and which other courts in recent years have routinely employed to entertain, and grant, immunity defenses even at the pleadings stage. *See Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985) (and cases cited). Although such a pleading standard has not yet been explicitly adopted by this Court, this Court should, at the very least, grant certiorari in this case and reverse the court of appeals under such a standard. Such a result is necessary to effect the goals of immunity, "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." 59 U.S.L.W. at 4467.

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[2] The complaint's suggestion that it is beyond the authority conveyed by § 5(f), *simpliciter*, for OHA to expend 5(f) monies on Hawaiians of less than 50 per cent Hawaiian ancestry (*see* Pet. App. 32) is wholly without merit insofar as Hawaii may grant monies for such Hawaiians under the "public use" clause.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and ultimately reverse the judgment of the Court of Appeals, with instructions to affirm the judgment of the District Court or to entertain a claim of qualified immunity.

Because the issues involved in this appeal are related to those in *Hafer v. Melo*, No. 90-681 (U.S. cert. granted Feb. 25, 1991), and *Suter v. Artist M.*, No. 90-1488 (U.S. cert. granted May 13, 1991), the Court may wish to hold the petition in this case pending the dispositions in those cases.

In addition, because the decision in *Siegert v. Gilley*, No. 90-96, sheds added light on the applicability of qualified immunity in the absence of discovery when immunity turns upon a "purely legal issue," and the court of appeals did not have the benefit of *Siegert*, the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Siegert v. Gilley*, No. 90-96 (U.S. May 23, 1991).

Dated: Honolulu, Hawaii, June 19, 1991.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NUI LOA PRICE, Dr., aka Maui Loa, individually and in his capacity as chief of Hou Hawaiians; THE HOU HAWAIIANS, a native Hawaiian Ohana; KAMUELA PRICE, individually and in his capacity as member of elder council of the Hou Hawaiians, *Plaintiffs-Appellants,* v. MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUIS HAO et al., *Defendants-Appellees.*	No. 89-15169 D.C. No. CV-88-0773 DAE ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted
May 16, 1990 – San Francisco, California

Filed September 25, 1990
Amended March 21, 1991

Before: Mary M. Schroeder and William C. Canby, Jr., Circuit Judges, and Judith N. Keep,* District Judge.

* The Honorable Judith N. Keep, United States District Judge for the Southern District of California, sitting by designation.

ORDER

The panel has voted to amend its opinion filed on September 25, 1990 in conformity with the Amended Opinion attached.

With that amendment, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and of the amended opinion and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

CANBY, Circuit Judge:

Nui Loa Price, Kamuela Price and the Hou Hawaiians, a native Hawaiian tribal body, (hereinafter "Price"), appeal from the district court's dismissal of their action, brought under 42 U.S.C. § 1983, for damages against the trustees of the Office of Hawaiian Affairs. Price alleges that the defendants contravened federal law restricting the management of Hawaiian lands previously held by the United States. The district court dismissed the action for failure to state a claim and for lack of subject matter jurisdiction. We reverse and remand the case to the district court.

FACTS

When Hawaii achieved statehood, the United States ceded to the new State almost all of the Hawaiian lands to which the federal government held title. *See* Hawaii Admission Act, Pub.L. No. 86-3 (hereinafter the "Admission Act") § 5(b), 73 Stat. 5 (1959), as amended by the Hawaiian Omnibus Act, Pub.L. No. 86-624, 74 Stat. 411 (1960). At the same time, the United States imposed obligations upon Hawaii with respect to these lands. In particular, it specified that such lands, and the income from them

> shall by held by [Hawaii] as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians . . . for the development of farm and home ownership . . . , and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of [Hawaii] may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

See Admission Act § 5(f).

In its constitution, Hawaii declared that it would hold a portion of the lands conveyed by § 5(b) as a "public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4. Subsequently, the Hawaiian legislature established the Office of Hawaiian Affairs (hereinafter the "OHA") to serve "native Hawaiians and Hawaiians." Haw. Const., art. XII, § 6. The state funded the OHA in part by granting it a share of the income

produced by the "public land trust" created out of the § 5(b) lands. Haw. Rev. Stat. § 10-3.[1]

In this suit, filed under 42 U.S.C. § 1983, Price alleges that the trustees of the OHA have violated the Admission Act by managing income derived from § 5(b) lands in a manner that contravenes § 5(f) of the Act. More specifically, he contends that the trustees have comingled OHA's share of that income with other OHA funds; that they have expended none of it for the benefit of native Hawaiians; and that they have used it instead for purposes other than those listed in § 5(f). *See* Complaint, ¶¶15, 14, 16.

Without filing an Answer to Price's Complaint, the trustees moved to dismiss the action. The district court granted the motion on the grounds that (A) the court lacks subject matter jurisdiction, and (B) the Complaint

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[1] Among the lands expressly conveyed by § 5(b) were those known as the Hawaiian "homelands". A "compact" between Hawaii and the United States strictly limits the manner in which Hawaii may manage the homelands and the income they produce. *See* Admission Act § 4; *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1218-19 (9th Cir.) (*"Keaukaha I"*), *cert denied*, 444 U.S. 826 (1979); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1469 (9th Cir. 1984) (*"Keaukaha II"*); *Price v. Hawaii*, 764 F.2d 623, 625 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). The "public land trust" created by the Hawaiian constitution, however, does not include the homelands. *See* Haw. Const., art. XII, § 4. Consequently, the trust proceeds granted to the OHA are unrelated to the homelands, *see* Haw. Rev. Stat. § 10-3; and whether State officials are managing the homelands and the income they produce in conformity with the compact between Hawaii and the United States is not at issue in this case.

does not state a claim upon which relief can be granted. On appeal, Price takes issue with both of these rulings.

DISCUSSION

Having accepted the Complaint's allegations as true, and having construed the Complaint in the light most favorable to Price, *see Baker v. McNeil Island Corrections Ctr.*, 859 F.2d 124, 127 (9th Cir. 1988), we hold that Price has stated a claim and that the district court has jurisdiction to hear it. We conclude therefore that the court's dismissal was erroneous.

A. *Failure To State A Claim*

The district court found that Price has not stated a claim because the Admission Act does not impose the obligations that Price asserts the trustees have violated. This ruling is one of law and we review it *de novo*. *See Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1475 (1990).

[1] Section 5(f) of the Admission Act directed unequivocally that the lands conveyed to Hawaii in § 5(b), and the income produced by them, "shall be managed and disposed of for one or more" of five stated purposes. Admission Act, § 5(f). Because of OHA share of "public trust" income at issue in this case derives directly from the § 5(b) lands, § 5(f)'s limitation on uses applies to that income. In his Complaint, Price alleges that the trustees have expended the income on purposes other than those listed in § 5(f). *See* Complaint, ¶¶14, 16. Thus,

the Complaint states a claim to enforce the provisions of § 5(f) of the Admission Act.

[2] The fact that the trustees may, consistently with § 5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive Price of standing to bring his claim. We recently considered this very question, and determined that allegations such as those Price has made are sufficient to show an "injury in fact". *See Price*, 764 F.2d at 630.[2] In addition, allowing Price to enforce § 5(f) is consistent with the common law of trusts, in which one whose status as a beneficiary depends upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust. *See* Restatement 2d of the Law of Trusts, § 214(1), comment a;

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[2] The trustees argue that the *Price* decision on standing does not apply to this case because the relief sought in *Price* was prospective, while the relief sought here is retrospective. That difference, however, does not affect standing. We held in *Price* that native Hawaiians had standing to compel future compliance with the terms of § 5(f) even though compliance would not necessarily result in use of § 5(f) assets to benefit native Hawaiians. Following that precedent, we hold here that Price, as a native Hawaiian, has standing to seek redress for past violations of § 5(f) even though that redress may not necessarily benefit native Hawaiians. Moreover, we note that counsel for Price asserted at oral argument that among the *state*-authorized purposes for which the OHA may spend its funds, only one – the benefit of native Hawaiians – is authorized by § 5(f). If Price succeeds in proving that the trustees have misappropriated § 5(f) income and must return it to the OHA or § 5(f) trust, he might attempt to show, perhaps in a pendent claim, that the returned money must be used to benefit native Hawaiians. Thus, Price has a real stake in enforcing the terms of § 5(f).

see also id. at § 391 (stating that plaintiff with "special interest," beyond that of ordinary citizen, may sue to enforce public charitable trust).

[3] The trustees argue that they may not be held liable for breaching the terms of § 5(f) because the "OHA trust," which they manage and into which the OHA share of § 5(f) income was placed, is distinct from the trust created by § 5(f). Transferring a portion of the § 5(f) trust income to a state agency, however, did not dissolve or dilute the restrictions on how that income may be spent. So long as § 5(f) trust income remained in the hands of the state, as it did when transferred from the § 5(f) corpus to the OHA corpus, the § 5(f) obligations applied. Naturally, we accept that once the income has been "disposed of" or "use[d]" by the state, there are no § 5(f) limitations on subsequent use; however, we reject the trustees' suggestion that Hawaii "disposed of" or "used" § 5(f) trust income simply by transferring it to the OHA. Admission Act § 5(f). Because the funds are still in state hands, § 5(f)'s restrictions apply to the use or disposal of the income *by OHA*.

[4] The trustees also maintain that, although Hawaii itself may be bound by § 5(f), the trustees' obligations with respect to spending OHA funds are to state law alone. The trustees' position is squarely at odds with the principle of § 1983 in general, and our recent Admission Act decisions in particular. Any ordinary policeman sued under § 1983 defendant is, in his official function, a creature of the state, and his primary obligations are to state law; yet, he is not thereby relieved of the duty not to deprive persons of their federal rights. In a similar vein, the fourteenth amendment addresses itself to "states,"

but that does not mean that entities and agents inferior to states are incapable of violating the amendment by depriving citizens of due process and equal protection. *See, e.g., Sheuer v. Rhoads*, 416 U.S. 232, 235 (1974) (holding that state governor and state university president were sueable under § 1983 for due process violations). Furthermore, the defendants in *Keaukaha II*, officers of the Hawaiian Homes Commission, also answered to state law in the execution of their official functions; yet, they were held properly subject to a § 1983 suit for breach of § 5(f). *See* 739 F.2d at 1472.

B. *Subject Matter Jurisdiction*

The district court concluded that it lacks jurisdiction to hear Price's suit for two independent reasons: first, Price's claim is state rather than federal in nature, and therefore § 1983, the asserted basis of jurisdiction, is unavailable; second, Price's suit is against the trustees in their official capacities, and therefore barred by the eleventh amendment. These issues are reviewable *de novo*. *See Keaukaha I*, 588 F.2d at 1224-27 (federal nature of claim); *Keaukaha II*, 739 F.2d at 1471-72 (same); *BV Engineering v. University of California at Los Angeles*, 858 F.2d 1394, 1395 (9th Cir. 1988) (eleventh amendment immunity), *cert. denied*, 109 S. Ct. 1557 (1989).

1. *Nature of Price's claim*

[5] The right Price claims is indeed federal; thus, he has not failed to meet this requirement of § 1983. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 536 (1981) (§ 1983 plaintiff must allege deprivation of federal, not

state, right). In *Keaukaha II*, we held that the right asserted by the plaintiffs was federal because it was "specifically protected by an Act of Congress, the Admission Act, § 5(f)." 739 F.2d at 1472. The § 5(f) trust obligation, we said, was "rooted in federal law." *Id.* Moreover, we recently have characterized *Keaukaha II* as holding that "§ 5(f) of the Admission Act creates a federal 'right' enforceable under 42 U.S.C. § 1983." *Price*, 764 F.2d at 628; *see also Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir. 1990). The source of the right Price asserts here is precisely the same as the source of the right claimed in *Keaukaha II*, namely § 5(f) of the Admission Act. Hence, the right Price asserts also is federal, and § 1983 is available.

2. *Applicability of the eleventh amendment*

[6] Price is suing the trustees in their individual, rather than official, capacities, and thus his suit is not barred by the eleventh amendment. *See Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988) (noting that eleventh amendment does not prohibit individual capacity suits); *cf. Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985) (observing that official capacity suits are equivalent to suits against the entity itself, and raise eleventh amendment concerns where the entity is a state). Although the Complaint does not expressly state that Price is suing the trustees themselves, as opposed to the state, the "basis of the claims asserted and nature of relief sought" imply that this must be so. *See Central Reserve Life Ins. Co. v. Struve*, 852 F.2d 1158, 1161 (9th Cir. 1988) (relying on these factors, rather than on caption of complaint, to determine capacity in which defendant is being sued).

By seeking damages under § 1983, the Complaint indicates that the intended defendants are the trustees as individuals. *See Blaylock*, 862 F.2d at 1354 ("[D]amage actions brought under 42 U.S.C. § 1983 are generally viewed as suits against the individual"); *Demery v. Kupperman*, 735 F.2d 1139, 1145-46 (9th Cir. 1984) (construing § 1983 damage action as individual capacity suit), *cert. denied*, 469 U.S. 1127 (1985). To sue Hawaii itself, by proceeding against the trustees in their official capacities, would have been inconsistent with the very nature of Price's claim, since § 1983 applies only to deprivations of federal rights by "persons," and Hawaii is not a person under the statute. *See* 42 U.S.C. § 1983; *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304, 2307-08 (1989).[3]

[7] The trustees argue, and the district court found, that Price's suit must be against the trustees in their official capacities because the Complaint's allegations concern the trustees' conduct while performing their official functions. This argument confuses the capacity in which a defendant is sued with the capacity in which the defendant was acting when the alleged deprivation of rights occurred. The former need not coincide with the latter. Clearly, under § 1983, a plaintiff may sue a state officer in his individual capacity for alleged wrongs committed by the officer in his official capacity. *See, e.g., Blaylock*, 862 F.2d at 1354 (observing that plaintiff who

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[3] Only if Price had sought prospective relief could this inconsistency have been avoided; such an action against the trustees in their official capacities would not have been an action against the state. *See Will*, 109 S. Ct. at 2311 n.10. Price, however, has not sought prospective relief in his Complaint.

alleged failure by governor to administer certain law could avoid eleventh amendment bar by amending complaint to claim only damages against governor in his individual capacity); *Demery*, 735 S.2d at 1146 (construing as individual capacity suit an action against state medical board supervisor who enforced allegedly ineffective disciplinary order of board).[4]

CONCLUSION

The district court erred in concluding that Price has not stated a claim, and that the court is without jurisdiction to hear it. The order of dismissal is therefore REVERSED, and the case is REMANDED.

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[4] *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198 (9th Cir. 1988), *cert. denied*, 109 U.S. 2102 (1989), does not support the trustees' position. *Mitchell* held that the defendants in that case "share[d] in [the state's] eleventh amendment immunity because they were sued in their official capacities." It did not expressly state the basis on which it had decided that the action was an official capacity suit. *See id.* at 201-02. In that case, it was apparently undisputed that the plaintiffs were seeking damages from a California community college district, and that the officials of the district were being sued in their official capacity. The question was whether, under California law, the district should be regarded as a state agency. In this case, the plaintiffs have disavowed any claim for state funds, and have made it clear they are seeking damages from the personal estates of the individual defendants. The defendants therefore do not share the state's immunity from this suit.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, a.k.a MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually and in his capacity as member of the elder council of the HOU HAWAIIANS, Plaintiffs, vs. MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR., MOSES KEALE, SR., and KEVIN MAHOE, Defendants.	CIVIL NO. 88-00773 DAE

FILED
JAN 11 1989

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

The Hou Hawaiians, a native Hawaiian tribal body, along with its chief and one of the members of its elder council, brings this action for damages arising out of an alleged breach of duties by defendants, the elected Trustees of the Office of Hawaiian Affairs of the State of Hawaii. Plaintiffs claim the conduct of the defendants

violated their constitutionally protected rights giving rise to liability under 42 U.S.C. § 1983.[1]

Defendants filed this Motion To Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) [lack of subject matter jurisdiction] and 12(b)(6) [failure to state a claim]. Briefly stated, the grounds asserted are: 1) eleventh amendment sovereign immunity shields the defendants from suit in federal court; 2) the doctrines of res judicata and collateral estoppel bar this action; 3) plaintiffs have failed to state a claim upon which relief may be granted against the defendants in either their individual or official capacities; and 4) "[t]his Court has an independent duty to quickly terminate insubstantial lawsuits."[2]

In addition to controverting defendants' motion, plaintiffs claim that the defenses of res judicata and collateral estoppel may not be asserted as a basis for this motion until all pleadings have been filed. (Defendants had not as of the date of this motion filed an answer.)

I. FACTS

When Hawaii was admitted into the Union in 1959, the Home Lands Trust was incorporated into the state's

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[1] Plaintiffs' complaint also purports to seek Declaratory Relief pursuant to 28 U.S.C. § 2201. However, no facts are presented in the complaint relating to proposed declaratory relief and there is no prayer for such relief. In fact, the *only* reference to such a cause of action is found in the paragraph entitled JURISDICTION and states as follows: "This is an action seeking relief under Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 2201." (Complaint, p. 2). This court finds that plaintiffs' complaint does not state an action for Declaratory Relief.

[2] *See* Motion to Dismiss Complaint, p.2.

constitution. *See* Hawaii Admission Act of 1959, P.L. No. 86-3, § 4, 73 Stat. 4, 5 (1959). That trust was created by Congress in 1920 to provide lands for the use and benefit of native Hawaiian people of at least 50 percent native blood. *See* Hawaiian Homes Commission Act of 1920, Pub.L. No. 67-34, 42 Stat. 108 *et seq.* (1921).

Pursuant to § 5 of the Admissions Act, the United States conveyed the majority of its Hawaiian lands to the State of Hawaii but required that these "ceded" lands as well as all other property subsequently conveyed to the state by the United States be held in a public trust. The lands previously reserved for disposition by the Hawaiian Homes Commission under the 1920 Act were also included in this "5(f) trust". *See Price v. State of Hawaii*, 764, F.2d 623, 625 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 793 (1986). All proceeds of the 5(f) trust are to be used exclusively for "one or more" of five specified purposes, one of which is "for the betterment of the conditions of native Hawaiians".[3] There are no other express restrictions on the state's use of 5(f) trust proceeds.

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[3] § 5(f) of the Admissions Act provides, in relevant part:

> The lands . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust from the support of the public schools and other public education institutions, for the betterment of the conditions of native Hawaiians, . . . for the development of farm and home ownership on as widespread a basis as possible, for

(Continued on following page)

Pursuant to 1962 Hawaii Sess. Laws, Act 32, the State of Hawaii placed the management, administration and control of the 5(f) trust into the hands of the Department of Land and Natural Resources of the State of Hawaii. A separate agency, The Office of Hawaiian Affairs (OHA), was established by the Hawaii State Constitution, Art. XII, § 5[4], to administer all real or personal properties placed in trust with the OHA and requires that those assets "shall be held in trust for native Hawaiians and Hawaiians." Pursuant to Hawaii Rev. Stat. § 10-3, a portion of the trust corpus held by OHA is derived from a pro-rata share of the proceeds of the 5(f) trust. However, the 5(f) and OHA trusts remain distinct legal entities.

Plaintiffs assert that defendants, trustees of the OHA trust, are required to perform the same duties and are held to the same obligations as trustees of the 5(f) trust. Plaintiffs reason that this is so because, pursuant to statute, a portion of the 5(f) trust proceeds are placed in the OHA trust. Following this rationale, plaintiffs contend

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(Continued from previous page)

> the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. . . .

[4] Certain portions of the Hawaii State Constitution and Hawaii Statutes referred to herein have been renumbered since their original adoption. For simplicity's sake, only current citations will be used. All substantive portions of those authorities cited have remained unchanged.

that defendants have violated the 5(f) mandate by co-mingling funds attributable to 5(f) trust assets with other funds it controls. Plaintiffs further claim that defendants have not used funds attributable to 5(f) trust assets wisely because a portion of these assets are being spent on Hawaiians who are not entitled to benefit from the 5(f) trust: i.e., persons of less than 50% Hawaiian ancestry.[5]

II. APPLICABLE STANDARDS

A complaint should not be dismissed " 'unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." *Baker v. McNeil Island Corrections Ctr.*, No. 86-4064, slip. op. (9th Cir. October 12, 1988).

Pursuant to a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the court may receive among the forms of competent evidence affidavits to resolve any factual dispute. *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). The consideration of such evidence does not convert a motion to dismiss into one for summary judgment. *Id.*

In determining the sufficiency of a complaint under 12(b)(6), the established rule is that all well-plead allegations are true, and the complaint should not be dismissed for failure to state a claim unless it clearly appears that

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[5] The term "Hawaiian" is used to denote those of less than 50% Hawaiian ancestry while a "native Hawaiian" is one who is of 50% Hawaiian blood or more.

plaintiff can prove no facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957); *Jones v. Johnson*, 781 F.2d 769 (9th Cir. 1986).

III. Discussion

1. Standing

In order for plaintiffs to have standing to bring this action pursuant to 42 U.S.C. § 1983, they must allege a violation of a right, privilege or immunity secured by the United States Constitution or federal law. *Oppenheimer v. Roth*, 468 F.2d 901 (9th Cir. 1972). Here, however, plaintiffs have alleged a violation of state law only.

The Admissions Act states that land placed in the 5(f) trust, together with the proceeds from the sale or other disposition of that land and the income therefrom, shall be managed according to state law or in the manner the state constitution shall provide. *See* n.3, *supra*. Plaintiffs are therefore claiming that defendants have violated the state rules established to implement the federal purpose for which 5(f) trust lands and resultant proceeds were given, not the federal law which created that trust or its purpose.

This court finds that plaintiffs have alleged neither a violation of the United States Constitution nor of federal law for which they can seek protection from 42 U.S.C. § 1983.

2. Failure To State A Claim

The trust duties which the defendants are alleged to have breached are: 1) failure to keep 5(f) trust proceeds

separate from other funds involved in the OHA trust and from the state general fund; and 2) failure to properly manage and dispose of 5(f) trust proceeds: i.e., use them only "for the betterment of persons of 50 percent or more Hawaiian ancestry".

Hawaii Rev. Stat. § 10-5(1) allows the defendants to manage OHA trust assets "for native Hawaiians *and Hawaiians.*" (emphasis added). Therefore, to find defendants liable, this court must find that the duties alleged by plaintiffs exist in this context and that OHA trustees "inherited" those duties with respect to any proceeds which came into the OHA trust from 5(f) trust assets.

The Ninth Circuit has held that § 5(f) "places no other express limitations on the State's use of the trust fund proceeds" than to use those assets for one or more of the five purposes listed therein. *Price v. State of Hawaii*, 764 F.2d at 625. However, this does not mean that additional duties may not be implied. Because there exists very little case law setting forth the principles of a federal common law of trusts, this court will apply general common law principles such as those found in the Restatement (Second) of Trusts. *See, Papasan v. Allain*, 478 U.S. 265, 280 n.12 (1986).

A basic rule of trusts is that the terms of the trust govern the nature and extent of the duties of the trustee. Restatement (Second) of Trusts § 164. The trustor is free to either impose or eliminate any duties upon the trustee which he deems appropriate. *Id.*, Comment h. p. 344 (1959).

The sum total of the duties expressly imposed upon the trustees of the 5(f) trust by the United States is found

in the requirement that the assets and proceeds of the trust be used for one or more of the five specified purposes "in such manner as the constitution and laws of said State may provide." *See* n.3, *supra*. In other words, the trustor (United States) declared by the clear and unambiguous terms of the trust that it is up to the *state* to impose or not impose whatever duties it sees fit upon the trustees so long as the *use* of the assets and proceeds of the trust accomplishes the federal government's mission. That mission is to provide lands or proceeds derived therefrom for one or more of five listed purposes, only one of which is limited to "native Hawaiians".

The plaintiffs have not cited nor is this court aware of any state law which requires the 5(f) trustees to maintain 5(f) funds separate from all other state funds or to use those funds *solely* for native Hawaiians. This being the case, even if 5(f) trust duties were "inherited" by the defendants, the alleged duties which form a basis for plaintiffs' complaint in this case would not be among them.[6]

This court also notes, however, that even if plaintiffs were able to establish the existence of these alleged duties and could further show a breach of those duties, this would be a breach of a duty created by state not federal

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[6] *See Doctor Nui Loa Price, a.k.a. Maui Loa, et al. v. William W. Paty, etc. et al.*, Civil No. 87-0115, (D. Hawaii Sept. 1, 1988) (Order Granting Motions for Summary Judgment and Denying Motion for Reconsideration). Faced with the same alleged duties, among others, which these same plaintiffs asserted under § 5(f), Chief Judge Fong reached the same conclusion.

law. The effect of that result would be to create a cause of action cognizable in state but not federal court.[7]

To summarize, the "duties" plaintiffs complain defendants breached are not duties imposed upon defendants. Further, even if they were so imposed, by the very terms of § 5(f), they would be duties imposed by state law as opposed to federal law. Either way, plaintiffs are unable to state a claim upon which relief can be granted in this court.

3. Eleventh Amendment Sovereign Immunity

The eleventh amendment immunizes the state, and therefore its agents, from suit in federal court unless such immunity is waived by the state. The waiver must be clear and unmistakable before a federal court may take jurisdiction. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Plaintiffs cannot bring this suit against state officials in their official capacities without the consent of the state. This is so because an action against an agent of the state acting in his official capacity is an action against the state itself. A state is not a "peron" within the meaning of 42 U.S.C. § 1983. *See Peters v. Lieuallen*, 693 F.2d 966, 970 (9th Cir. 1982). This immunity applies "regardless of the nature of the relief sought". *Alabama v. Pugh*, 438 U.S. 781 (1978) (per curium); *Mitchell v. Los Angeles Community College*, Nos. 87-6553 and 87-6618, slip op. (9th Cir. November 8, 1988).

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[7] *See* court's discussion under "Standing" above.

There is a built-in waiver allowing suit in federal court for breaches of the stated 5(f) trust purposes. However, that provision of the trust does not assist plaintiffs. It allows the United States to bring suit but makes no provision for suit by private parties or organizations.[8]

The only other waiver of the state's immunity from suit for tort liability (breach of trust) is found in Hawaii Rev. Stat. § 662-2.[9] That waiver, however, allows suit only in state court. *See* Hawaii Rev. Stat. § 662-3 and 1984 Hawaii Sess. Laws, Act 135. "[A] State's waiver of sovereign immunity in its own courts is *not* a waiver of the eleventh amendment immunity in the federal courts." *Pennhurst School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis added).[10]

Plaintiffs do not question that the defendants are employees of the state and entitled to enjoy some immunity from suit in federal court. They argue, however, that

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[8] Section 5(f) provides that the use of the lands placed in the trust or proceeds or income therefrom for "any other object" than those purposes stated therein "shall constitute a breach of trust for which suit maybe brought by the United States." *See* n.3, *supra*.

[9] Hawaii Rev. Stat. § 662-2 provides: The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

[10] It should be noted that, while a state may not enjoy immunity from requests to enjoin *future* violations of federal law, *Papasan v. Allain*, 478 U.S. 265, 280 (1986), no such relief is requested here.

the defendants have only qualified immunity because they are being sued in their individual capacities. Viewing the pleadings in the light most favorable to plaintiffs, however, this is not the case.

The paragraph of plaintiffs' complaint which identifies the defendants alleges that defendants are "residents of the District and State of Hawaii and are the duly elected and acting Trustees of the Office of Hawaiian Affairs of the State of Hawaii." (Complaint, p. 3, ¶ 4). The only other possible reference to a suit against the defendants in their individual capacities is in the prayer where plaintiffs ask for "judgment against Defendants jointly and severally". (Complaint, p. 5). All other allegations are couched in terms of acts performed by defendants as trustees of the OHA trust.

This court finds that these references do not satisfy even the liberal pleading rules of Fed. R. Civ. P. 8(e) or L.R. 100-4 and do not allege liability for conduct in defendants' *individual* capacities.

Plaintiffs further argue that this is not an action against the state at all since the state would not be liable for any acts of the members of the Office of Hawaiian Affairs. Plaintiffs conclude that Hawaii Rev. Stat. § 10-16(a) plainly shows that "[t]here is no way that the treasury of the State of Hawaii may legally be held liable for defendants' alleged misapplication of funds" and may therefore be sued under Hawaii Rev. Stat. § 10-16(c). (Plaintiffs' Memorandum In Opposition To Motion To Dismiss Complaint, p. 11.)[11]

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[11] Hawaii Rev. Stat. § 10-16 provides as follows:

Suits. (a) The office (Office of Hawaiian Affairs) may sue and be sued in its corporate name. The State

(Continued on following page)

This argument might have some validity if defendants were being sued in their individual capacities. However, a reading of Hawaii Rev. Stat. § 10-16(a) and (b) makes it clear that § 10-16(c) applies only to suits against trustees of OHA in their *individual* capacities. As noted above, all claims in plaintiffs' complaint in this case are against defendants for acts performed in their *official* capacities.

An action is against the state if "the judgment would expend itself on the public treasury or domain, or interfere with public administration" of if the judgment's

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(Continued from previous page)

> shall not be liable for any acts or omissions of the office, its officers, employees, and the members of the board of trustees, except as provided under subsection (b).
>
> (b) In matters of tort, the office, its officers and employees, and the members of the board shall be subject to suit only in the manner provided for suits against the State under chapter 662.
>
> (c) In matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office, either through the office of the attorney general or through private council.
>
> (d) In matters involving other forms of remedies, the office, its officers and employees, and the members of the board shall be subject to suit as provided by any other provision of law and by the common law.

Chapter 662 is the State Tort Liabilities Act. The only waiver found therein is in Hawaii Rev. Stat. § 662-2. *See* n.9, *supra*.

effect would "restrain the Government from acting, or compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Under this definition, this is an "action against the state.".

Defendants are entitled to the state's eleventh amendment immunity from suit in this court under the facts as alleged in plaintiffs' complaint.

4. Res Judicata and Collateral Estoppel

Defendants claim that all of the issues in plaintiffs' complaint have already been decided in Price I (*Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 106 S.Ct. 793 (1986)), Price II (*Price v. Ariyoshi*, Civil No. 85-1189 (Hawaii 1987), *app. dismissed*, May 25, 1988) and/or Price III (*Price v. Paty*, Civil No. 87-0115 (Hawaii 1988), *appeal filed*, October 11, 1988). Defendants refer to this case as "Price IV".

The plaintiffs, on the other hand, assert that these two doctrines are defenses and are to be raised in defendants' answer or after all pleadings are filed, not as grounds for a motion to dismiss before an answer is filed.

Although this court has serious concern about the number of "*Price*" cases in this District, this court will not reach this issue because the complaint must be dismissed on other grounds.

5. Lack of Subject Matter Jurisdiction

Fed. R. Civ. P. 12(h)(3) states:

> Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction

of the subject matter, the court shall dismiss the action.

Because the eleventh amendment clearly bars this suit in this court against the defendants as discussed above, this court must dismiss the action for lack of subject matter jurisdiction.

IV. CONCLUSION

This court notes that many issues have been raised by the plaintiffs which go far beyond the scope of this case. There can be no question that the Hawaiian people have suffered injustice and inequity in the past as have other native peoples in other places. However, this court has no statutory or constitutional mandate to go beyond the case or controversy before it.

The questions before this court are: whether the complaint filed in this case and in this court meet the requirements of the Federal Rules of Civil Procedure for such a complaint; whether a claim under 42 U.S.C. § 1983 is properly alleged in that complaint; and, whether there exists a proper statutory or constitutional basis for that claim as the complaint is drafted.

Taking all material facts of plaintiffs' complaint as true and in the light most favorable to plaintiffs (*Baker v. McNeil Island*, No. 86-4064, slip. op. (9th Cir. October 12, 1988)), this court finds that there is no set of facts set forth in the complaint which, if proven, would entitle plaintiffs to relief. *See Conley v. Gibson*, 335 U.S. 41, 45-46 (1957); *Jones v. Johnson*, 781 F.2d 769 (9th Cir. 1986); and *Baker, supra*. Further, because of the eleventh amendment

immunity provided to the defendants under the facts of this case, this court lacks subject matter jurisdiction.

Therefore, based on the foregoing, defendants' Motion To Dismiss plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(h)(3) is hereby GRANTED and plaintiffs' complaint is hereby dismissed.

DATED: Honolulu, Hawaii, JAN 11 1989

/s/ David A. Ezra
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF Hawaii

JUDGMENT IN A CIVIL CASE

DOCTOR NUI LOA PRICE, etc., et al.

V.

MOANIKEALA AKAKA, et al.

CASE NUMBER: 88-00773 DAE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Defendants' Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 12(h)(3) is GRANTED and the Plaintiffs' complaint is hereby DISMISSED.

FILED JAN 17 1989

cc: all counsel

JAN 17 1989 — /s/ Walter A.Y.H. Chinn

Date — *Clerk*

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually, and in his capacity as member of the elder council of the HOU HAWAIIANS, Plaintiffs, vs. MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR., MOSES KEALE, SR., and KEVIN MAHOE, Defendants.	) CIVIL NO. 88-00773 DAE COMPLAINT; DEMAND FOR JURY TRIAL FILED OCT 18 1988

COMPLAINT

Come now Plaintiffs, THE HOU HAWAIIANS, DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as hereditary chief of the HOU HAWAIIANS, through their undersigned counsel, and KAMUELA PRICE, individually and as member of the elder council of the HOU HAWAIIANS, *pro se*, and for Complaint against Defendants allege and aver as follows:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1343, Article VI, Clause 2 of the Constitution of the United States of America. This is an action seeking relief under Title 42 U.S.C. § 1983 and Title 28 U.S.C. § 2201. The rights sought to be secured in this action are right of Plaintiffs as Native Hawaiian special beneficiaries of a trust imposed by § 5(f), Act of March 18, 1959, L. 86-3, Stat. 4, (Admission Act), upon certain lands granted by the United States to the State of Hawaii by §§ 5(b) and 5(e) of the Admission Act.

PARTIES

2. The HOU HAWAIIANS is a Native Hawaiian Ohana or tribe made up of related families of native Hawaiians of 50% or more Hawaiian ancestry. Plaintiff DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, is the hereditary chief of the HOU HAWAIIANS, and is a native Hawaiian of 50% ancestry. Plaintiff KAMUELA PRICE is a member of the elder council of the HOU HAWAIIANS and sues individually and in such capacity. Plaintiffs are residents of the District and State of Hawaii.

3. Plaintiff DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, is eligible for a 99 year lease of Hawaiian Home Lands and other Native Hawaiian entitlements as provided in § 5(f) of the Admission Act.

4. Defendants MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR.,

MOSES KEALE, SR., and KEVIN MAHOE (hereafter collectively called "Defendants") are residents of the District and State of Hawaii and are the duly elected and acting Trustees of the Office of Hawaiian Affairs of the State of Hawaii.

COUNT I

5. In 1959, Congress granted to the State of Hawaii all of the excess real property owned by the United States within the territorial limits of the State by § 5(b) of the Admission Act, and provided for the conveyance of additional excess lands to the State of Hawaii after admission by § 5(e) of the Admission Act. All of said § 5(b) and § 5(e) lands are hereafter referred to as "TRUST LANDS".

6. Congress imposed a trust upon the TRUST LANDS and the proceeds from the sale or other disposition of the TRUST LANDS and the income therefrom (Hereafter called "TRUST INCOME") by § 5(f) of the Admission Act, which provides as follows:

> "The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the

> provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university."

7. The State of Hawaii accepted the TRUST LANDS and said trusts by Article XIV, §§ 7 and 8, of the Constitution of the State of Hawaii adopted at Constitutional Convention, July 22, 1950, ratified by election on November 7, 1950, amended by Congress and ratified by election on June 27, 1959, effective on the date of admission, August 21, 1959.

8. Article XII, Sections 5 and 6 of the Constitution of 1978 of the State of Hawaii established the Office of Hawaiian Affairs of the State of Hawaii.

9. The Office of Hawaiian Affairs is governed by Chapter 10, Hawaii Revised Statutes.

10. H.R.S. § 13.5, requires that twenty percent of the TRUST INCOME be paid to Defendants "for the purposes of this Chapter."

11. Defendants are required by law to perform the duties of trustees pursuant to § 5(f) of the Admission Act.

12. By virtue of the aforesaid trusts, Defendants owe a duty to Plaintiffs to hold the TRUST INCOME received by them separate and apart from the other funds held by them.

13. By virtue of the aforesaid trusts, Defendants owe a duty to Plaintiffs to manage and dispose of the TRUST INCOME and invest and reinvest the income therefrom in a reasonably prudent manner towards the purposes and uses enumerated by Congress for the benefit of Plaintiffs.

14. On information and belief, Defendants have not held the TRUST INCOME and income therefrom separate and apart from the other funds held by Defendants; and have failed to manage and dispose of the TRUST INCOME and invest and reinvest the income therefrom in a reasonably prudent manner towards the purposes and uses enumerated by Congress and in particular for the betterment of persons of 50 percent or more Hawaiian ancestry.

15. On Information and belief, Defendants have comingled the TRUST INCOME and income therefrom with other funds of said Defendants.

16. On information and belief, Defendants have expended portions of the TRUST INCOME for uses and purposes other than those purposes permitted by § 5(f) of the Admission Act, and in particular, have expended said TRUST INCOME for the benefit of persons denominated as "Hawaiians" who are persons of less than 50% Hawaiian ancestry and who are not beneficiaries of the § 5(f) Trust.

17. Defendants, acting under color of State law, have deprived Plaintiffs of their rights, privileges, or immunities under the Constitution and laws of the United States of America as special beneficiaries of the aforesaid trusts.

18. As the result of the wrongful acts of Defendants, Plaintiffs have been damaged in an amount to be proven at trial.

WHEREFORE, Plaintiffs pray that, following trial on the merits herein, this court, that they have judgment against Defendants jointly and severally in an amount as shall be proven at trial and for such other and further relief as may be warranted under the facts and law.

DATED: Honolulu, Hawaii, October 18, 1988.

/s/ Walter R. Schoettle
WALTER R. SCHOETTLE,
Attorney for Plaintiffs,
DOCTOR NUI LOA PRICE, *et al.*

/s/ Kamuela Price
KAMUELA PRICE

DEMAND FOR JURY TRIAL

Plaintiffs demand trial by jury herein on all issues so triable. Dated: Honolulu, Hawaii, October 18, 1988.

/s/ Walter R. Schoettle
WALTER R. SCHOETTLE,
Attorney for Plaintiffs,
DOCTOR NUI LOA PRICE, *et al.*

/s/ Kamuela Price
KAMUELA PRICE

APPENDIX "D"

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-15169
D/CT#: CV-88-0773-DAE

NUI LOA PRICE, DR., aka Maui Loa, individually and in his capacity as chief of Hou Hawaiians,; THE HOU HAWAIIANS, a native Hawaiian Ohana; KAMUELA PRICE, individually and in his capacity as member of elder council of the Hou Hawaiians

Plaintiffs-Appellants

v.

MOANIKEALA AKAKA; ROD BURGESS; CLARENCE CHING; FRENCHY DESOTO; LOUIS HAO et al.

Defendants-Appellees

APPEAL FROM the United States District Court for the U.S. District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the U.S. District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the —— judgment of the said District Court in this cause be, and hereby is reversed and remanded. Costs Taxed.

Filed and entered September 25, 1990

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

APR 04 1991

by: /s/ Oscar Tagle
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 23 1991
OFFICE OF THE CLERK

No. 90-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOANIKEALA AKAKA., *et al.*,
Petitioners,

v.

DOCTOR NUI LOA PRICE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WALTER R. SCHOETTLE
Attorney at law
Counsel of Record for Respondents Doctor Nui Loa Price and The Hou Hawaiians

KAMUELA PRICE, *pro se*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MOANIKEALA AKAKA *et al.*,

Petitioners,

v.

DOCTOR NUI LOA PRICE *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Respondents, DOCTOR NUI LOA PRICE, THE HOU HAWAIIANS, a native Hawaiian Ohana, and KAMUELA PRICE, respectfully pray that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

SCOPE OF RESPONSE

The first question presented for review by the Petition is whether it is necessary in a personal capacity suit against state officials to specifically allege that the officials are being sued in their individual capacities. This is a very narrow question that applies to a very broad class of civil rights cases.

Yet in discussion of this issue, Petitioners have devoted a very large portion of their brief to a discussion of their interpretation of native Hawaiian rights

under § 5(f) of the Hawaii Admission Act, Pub.L. 86-3, 73 Stat. 4 (1959) and the Hawaii Constitution.

Rule 14.1 (a) of the Revised Rules of the Supreme Court provides, in part, as follows:

> "The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court."

While the purpose of the Office of Hawaiian Affairs and the extent of native Hawaiian rights may be important issues worthy of review by this Court, they simply are *not* subsidiary questions, fairly included within the statement of the first question presented for review.

On the other hand, these issues might be considered subsidiary to the second question presented for review. A review of the rights of native Hawaiians and duties of Petitioners under § 5(f) must be made in order to determine whether Petitioners have qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). However, the issue of qualified immunity was not raised below until the Petition for Rehearing in the Court of Appeals. Therefore, the defense was waived below.

While Respondents do not agree with much of the argument contained in the Petition with respect to rights of native Hawaiians, we have limited our response to those issues to the extent necessary to address the questions presented for review.

COMMENTS ON MISSTATEMENTS IN PETITIONERS' STATEMENT OF THE CASE

A. Complaint alleges specific breach of trust. On page 7 of the petition, Petitioners state:

> "None of the complaint's operative allegations, particularly those relating to the breach of § 5(f), *simpliciter*, contained specific information of what had been done or not done to cause the breach . . . ." Pet., p. 7.

This statement is incorrect. The allegation of a specific breach of trust is contained in paragraph 16 of the complaint, as follows:

> "16. On information and belief, [Petitioners] have expended portions of the TRUST INCOME for uses other than those purposes permitted by § 5(f) of the Admission Act, and in particular, *have expended said TRUST INCOME for the benefit of persons denominated as "Hawaiians" who are persons of less than 50% Hawaiian ancestry and who are not beneficiaries of the § 5(f) Trust.*" Pet. App. p. 32a.

A discussion of distinction between the terms "native Hawaiian" and "Hawaiian" is necessary to a complete understanding of this allegation.

When Hawaii became a state, in 1959, most of the public lands in the Territory were given by Congress to the new state, under terms of a trust established by § 5(f) of the Admissions Act. One of the beneficial purposes of said trust was "for the betterment of the condition of native Hawaiians". The term "native Hawaiian" was defined by reference to the Hawaiian Homes Commission Act, as an Hawaiian of 50 per cent, or more, aboriginal blood. There are less than 25,000 native Hawaiians alive today.

In 1979, OHA was established by Hawaii Revised Statutes, Chapter 10, pursuant to Article XII of the 1978 Constitution of the State of Hawaii. OHA is governed

by a Board of Trustees, elected pursuant to Hawaii Revised Statutes, Chapter 13D. Electors for the office of Trustee of OHA must satisfy the qualification of being "Hawaiian." **H.R.S.** §13D-3(b)(1). There is no definition of the term "Hawaiian" in Chapter 13D.

OHA is funded with 20 percent of the income from the §5(f) trust; **H.R.S.** § 13.5, 10-2, as amended by Session Laws of 1991, Act 304, §§ 3 & 7); but charged with the duty of bettering the conditions of both "native Hawaiians" and "Hawaiians". **H.R.S.** §10-3(1) & (2), as amended by Session Laws of 1991, § 4. For purposes of **H.R.S.**, Chapter 10, "native Hawaiian" means a Hawaiian of 50 per cent or more aboriginal blood; and "Hawaiian" means any descendent of the aboriginal peoples of the Hawaiian Islands. **H.R.S.** §10-2, as amended by Session Laws of 1991, Act 304, § 3. The number of "Hawaiian" beneficiaries that OHA claims to represent is more than 250,000, and is ever growing larger.

Given this conflict of interest between Hawaiian and native Hawaiian beneficiaries, it was not surprising that, on May 21, 1988, the Petitioners, meeting in Hilo, Hawaii, adopted a resolution calling for a vote by "Hawaiian" voters on the question of whether there should be a single class of beneficiaries for a trust they described as "the OHA trust." [1]

In total disregard of their duties as trustees and the rights of native Hawaiians under the § 5(f) trust, OHA used §5(f) income to promote the single definition that would include "Hawaiians" as beneficiaries of the "OHA trust." [2]

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[1] Reported in the official newspaper of the Office of Hawaiian Affairs, *Ka Wai Ola O OHA*, Vol. 5, No. 11, Nov., 1988.

[2] The investigative report of the Attorney General of the State of

In response to this attempt to enlarge the class of beneficiaries more than ten-fold, on October 18, 1988, Respondents filed suit for breach of the § 5(f) trust, alleging specific wrongful conduct in paragraph 16, quoted above.

b. Respondents do not concede that Petitioners "have" qualified immunity. On page 12 of the Petition, it is implied that Respondents conceded that Petitioners are entitled to qualified immunity. If this had been so, Respondents would not have appealed, and the decision of the district court would not have been reversed.

c. The questions presented for review were not adequately raised in the courts below. Respondents have made a careful review of the Petitioners' motion to dismiss and reply memorandum, filed in the District Court below, and Petitioners' Reply Brief and Petition for Rehearing, filed in the Court of Appeals. The first appearance of the words "due process" or "qualified immunity" in those documents is in the last two pages of the Petition for Rehearing.

In the Petition for Rehearing, the due process argument comprises one sentence, as follows:

> "Contrary to the panel ruling, this re-casting of the Complaint raises serious and substantial due process problems for the capacity a defendant is sued must be apparent at the actions's onset, *see Kentucky v. Graham*, 473 U.S. 159 (1985); *Brandon v. Holt*, 469 U.S. 464 (1985)." Petition for Rehearing, p. 14

Hawaii, dated November 2, 1988, and signed by Terrence S. Yamamoto and Warren Price, III, counsel for Petitioners herein and below, found that Petitioners expended §5(f) funds to promote "the planned OHA policy and plebiscite regarding a single beneficiary class definition."

The qualified immunity argument is contained in one paragraph, as follows:

> "Indeed, although not discussed in the opinion, the issue of qualified immunity was pressed below by Appellees (*see* C.R. 12 (Mem. at 10) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)), and is therefore properly a ground for affirmance. *See Whitley v. Albers*, 475 U.S. 312, 326 (1986); *Jackson v. Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989). While immunity may undoubtedly be raised on remand as a defense upon a motion for judgment on the pleadings, given that a denial of immunity is immediately appealable, Defendants submit there is no point to sending this case on what, at best, will be 'a brief round trip to the court [] below.' *Lyng v. Northwest Indian Cemetary Protective Ass'n.*, 485 U.S. 439, 447 (1988). As a matter of judicial economy, and, because, in light of the arguments presented in Part 'B' *supra*, there is no doubt that immunity would apply under *Anderson v. Creighton*, 483 635 (1987), rehearing or *en banc* review should be granted, and the judgment affirmed." Petition for Rehearing, p. 15.

The reference in this quotation to CR 12, p. 10 of the District Court record is as follows:

> **"D. This Court Has An Independent Duty To Quickly Terminate Insubstantial Lawsuits. Since The complaint Does Not State A Compensable Claim For Relief, It Should Not Survive A Motion To Dismiss.**
>
> "The key issue of whether congress has imposed the trust duties allegedly violated by the trustees

of OHA has been decided adversely to Plaintiffs in 'Price III.' There are no other substantial federal claims to be resolved in this action. In *Harlow v. Fitzgerald*, 457 U.S. 800, 808, 73 L.Ed.2d 396, 404 (1982), the United States Supreme Court, quoting *Butz v. Economu*, 438 U.S. 478, 57 L.Ed.2d 895 (1978), stated in pertinent part:

> "'Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief . . . , it should not survive a motion to dismiss. Moreover, the Court recognized in Scheuer that damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . . In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.' 438 US, at 507-508, 57 L. Ed. 2d 895, 98 S.Ct. 2894 (citations omitted)." CR. 12 (Mem. p. 10).

This being the entire record of argument on these issues below, Respondents respectfully suggest that the issues were raised too late and inadequately developed below to provide the basis for a writ of certiorari herein.

QUESTION ONE

The prayer for relief in the complaint seeks "judgment against Defendants jointly and *severally*". Pet.

App. p. 33a. Petitioners' assertion that the complaint is ambiguous as to the capacity in which they are sued is based on a misunderstanding of the word "severally." "Severally" might seem to be synonymous with the word "jointly", but actually it is synonymous with the word "individually." As defined in Webster's New World Dictionary, Second College Edition (1972), "severally" is an adverb, defined as follows:

> "1. separately; distinctly 2. respectively; *individually*" [Emphasis added.]

Petitioners' prior counsel apparently understood the meaning of "severally", on November 1, 1988, when she filed Petitioners' motion to dismiss the complaint in the District Court, below. There, Petitioners argued:

> "Plaintiffs, for obvious reasons, did not request this Court to impose § 1983 damages against OHA, a governmental agency, or against the named trustees in their official capacities. *It appears that they are attempting to obtain §1983 damages against the trustees as individuals.* They ask for money damages against Defendants jointly and severally." CR. 12, (Mem. p. 8-9). [Italics added, underscore in original.]

The ambiguity in the complaint seems to have developed only recently.

Petitioners now insist that due process requires a specific statement in the complaint telling them what they already knew: that they were being sued for damages in their individual capacities.

Such a rule would be contrary to the liberal pleading practice established by F.R.Civ.Proc., Rule 8(a). It would be a step back to the days before the Rules when

pleading was "a game of skill in which one misstep by counsel may be decisive to the outcome. . . ." *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 2 L.Ed.2d 80, 85-86 (1957).

Moreover, the alleged defect in the complaint of which Petitioners complain, can be easily cured by amendment of the complaint. The question might be rendered moot, if the district court were to grant a motion to amend the complaint while the matter is pending before this court.

Precedent of this Court is clear: that there are two, and only two, allegations that must be pleaded in order to state a claim under § 1983. *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980). The capacity in which the defendants are being sued is not one of them. Petitioners are now asking this court to add a third allegation in order to state a claim.

Respondents relied upon the precedent of *Gomez v. Toledo* in drafting the complaint. CR. 13, (Mem. p. 4). Manifest injustice would result if a new rule were adopted without allowing Respondents to amend their complaint.[1] If the Court grants certiorari, establishes a new rule and then allows Respondents to amend the complaint to comply with the rule, the case will have been delayed and the parties will have been put to a great deal of expense, without any net effect on the

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[3] In *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) and *Wells v. Brown*, 891 F.2d 591 (6th Cir. 1989), cited by Petitioners, the Courts affirmed dismissal without leave to amend. However, the decisions were based on jurisdictional grounds, citing F.R.Civ.Proc., Rule 9(a). A dismissal on grounds of lack of subject matter jurisdiction is not a decision on the merits; and, therefore, does not preclude a new suit, making the proper allegation.

outcome of the case.

If the Court is inclined to adopt a new rule, certiorari should be granted in a case where the Court of Appeals has applied the rule and dismissed the complaint.

QUESTION TWO

In their second question presented for review, Petitioners suggest that the Court of Appeals should have affirmed the decision of the district court in spite of the fact that they had not raised the issue on appeal until their petition for rehearing. This is justified on the grounds that the complaint is allegedly vague and Petitioners' statutory duties are unclear. Respondents disagree on both points.

As noted above, the complaint clearly alleges a breach of the § 5(f) trust on account of expenditure of § 5(f) income to benefit Hawaiians as distinguished from native Hawaiians. This is clearly alleged in paragraph 16 of the complaint. Pet. App., p. 32a.

Under the particular circumstances of this case, it is not necessary to inquire whether the law clearly prohibits such expenditures. This is so, because the trustees did not make these expenditures without advice of counsel. On March 15, 1983, Mr. T. C. Yim, Administrator of the Office of Hawaiian Affairs requested an opinion of the Attorney General of the State of Hawaii on the following question:

> "May the legislature, consistent with Section 5(f) of the Admission Act and Article XII of the State Constitution, authorize OHA to use funds derived from the Public Land Trust (Section 5(f) of the Admission Act) to better the conditions of Hawaiians as defined in Hawaii Revised Statutes,

Section 10-2(5)?" CR. 13, (Ex. "A", p. 1.).

The answer of the Attorney General was in the negative. Att. Gen. Op. No. 83-2 (1983). A copy of the opinion of the Attorney General is attached as Exhibit "A" to Plaintiffs' memorandum in opposition to the motion to dismiss. CR. 13, Ex. "A".

By this opinion Petitioners were informed that even if the State Legislature purported to authorize them to expend trust monies to benefit Hawaiians (as distinguished from native Hawaiians), that such authorization would be contrary to the trust mandate of § 5(f) of the Admissions Act. Petitioners action in deliberate and considered defiance of this Attorney General opinion was either "plainly incompetent" or a "knowing violation of the law." *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

CONCLUSION

For the foregoing important reasons, Respondents respectfully request this Court to deny the Petition for Writ of Certiorari to the Ninth Circuit Court of March 21, 1991, and published as *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1991).

Dated: Honolulu, Hawaii, July 19, 1991.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Kamuela Price

(3)

No. 90-1941

Supreme Court, U.S.
FILED
SEP 23 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR., MOSES, KEALE, SR., and KEVEN MAHOE,

Petitioners,

vs.

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually and in his capacity as member of the elder council of the HOU HAWAIIANS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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No. 90-1941

In The

Supreme Court of the United States

October Term, 1991

MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR., MOSES, KEALE, SR., and KEVEN MAHOE,

Petitioners,

vs.

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually and in his capacity as member of the elder council of the HOU HAWAIIANS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

SUMMARY OF ARGUMENT

Respondents' brief in opposition demonstrates more clearly than ever that this Court should grant review to correct the Ninth Circuit's expansive invitation to personal damage suits against state officials in Hawaii who

are charged, under state law, with the duties of expending funds derived from public trust lands conveyed upon Statehood by Hawaii's admission act.

ARGUMENT

A. Review Should Be Granted to Correct the Ninth Circuit's Expansive Presumption that Suits for Damages Under 42 U.S.C. 1983 are, Without More, "Individual Capacity" Suits.

The Ninth Circuit in this case expressly held that the sole reason Respondents were entitled to proceed at all against the Trustees of the Office of Hawaiian Affairs in their individual capacities was that, because money relief was sought, "[t]o sue Hawaii itself, by proceeding against the trustees in their individual capacities, would have been inconsistent with the very nature of [the] claim." Pet. App. 10a. This ruling, which intertwines the merits of a sovereign immunity defense with the notice conveyed by the complaint in a civil matter is as the Petition demonstrates, in square conflict with the decisions of three other circuits, and is at odds with all understanding of pleading practice, and, indeed, due process of law. *See* Pet. for Cert. at 14-17.

Respondents do not seriously defend the Ninth Circuit's judgment on its own terms, but instead argue that (a) the issue was waived (*see* Resp. Br. 5-6, 8), and, in any case (b) language in the complaint seeking liability

"jointly and severally" was sufficient to meet applicable pleading requirements (*id.* at 8).

Both arguments are seriously in error.

First, from the very beginning of this action, the Trustees have argued that the allegations of the Complaint did not state claims against them in their individual capacity.[1] Respondents do not dispute this fact. Rather, their objection is, at most to the "mere enlargement" of an error raised below, and, for this reason, Respondents' argument would be inapt even if this case arose from a state court, where the duty to preserve error below is at its height. *See, e.g., Bankers' Life Ins. Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988) (quoting *Dewey v. Des*

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[1] Respondents quote only selectively from Petitioners' memorandum in the District Court (*see* Resp. Br. 8), but do not dispute that Petitioners argued, and the District Court found, that the Complaint failed to allege facts sufficient to render the action one for individual capacity relief. *See* Pet. App. 22a (District Court order). Indeed, in their dispositive motion memorandum in the District Court, Petitioners went on at length to argue in passages omitted from Respondents' brief that they "are entitled to a dismissal of the claims against them in their individual capacities" as "this case is in reality an official capacity suit," in that "[a] suit against a state's agencies *or* its officers or agents [without more] is a suit against the state and not against its officers or agents in their individual capacities." *See* Clerk's Record ("C.R.") 12, No. 88-0773 (D. Haw. filed Nov. 1, 1988) (Mem. at 9) (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)). Thus the fact that Petitioners stated below that "it appears that [Respondents] are *attempting* to obtain § 1983 damages against the trustees as individuals" (*see id.* and Resp. Br. 8) (emphasis added) does not concede anything about whether Respondents *sufficiently* attempted to do so to give Petitioners adequate legal notice.

Moines, 173 U.S. 193, 198 (1899)). Moreover, the Ninth Circuit's entire judgment rests on considered and express written rulings adopting the individual capacity-suit presumption. "It [thus] suffices for [this Court's] purposes that the court below passed on the issue presented," "particularly where the issue is. . . . '" in a state of evolving definition and uncertainty." '" *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991) (citations omitted). Finally, because amendment of the complaint at this stage would be futile against the individual capacity defendants in light of the two-year statute of limitations that applies to pre-1990 claims filed under 42 U.S.C. § 1983 in the District of Hawaii (*see* H.R.S. § 657-7 (1985)), the issue of whether the Petitioners were properly sued in their individual capacities presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 416 (1990). In short, Question 1 presented by the Petition for Certiorari is before the Court.

Second, Respondents' effort to shore up the judgment below by calling attention to the words "jointly and severally" in the Complaint's prayer (*see* Resp. Br. at 8) only demonstrates why the Ninth Circuit's reversal is error. For Respondents' dictionary definition of "jointly and severally" (*see id.*) has nothing to do with the individual capacity/official capacity distinction as it has evolved in this Court's decisions. *E.g.*, *Kentucky v. Graham*, 473 U.S. 159 (1985); *Brandon v. Holt*, 469 U.S. 464 (1985). It does not provide any guidance as to whether execution, if it comes, will run against state funds as a general matter, state funds in the named officer's individual control, or

the personal assets of the named officer. Without the Ninth Circuit's individual-suit presumption, there is thus no basis for concluding that individual-capacity relief was properly sought in the Complaint. That presumption, which sharply conflicts with the rulings of the Sixth, Seventh, and Eighth Circuits, is groundless as a matter of logic and precedent, and is not even defended by Respondents. This Court should thus hold this case pending the disposition in *Hafer v. Melo*, No. 90-681 (U.S. cert. granted Feb. 25, 1991), which may bear upon the issue raised in Question 1, or grant plenary review now.

B. Review Should Be Granted to Correct the Ninth Circuit's Palpably Erroneous Refusal to Grant Qualified Immunity.

Respondents do not deny that they have conceded from the beginning of this suit that qualified immunity is an applicable defense to the claims presented in the Complaint.[2] Nonetheless, they argue that the defense is "raised too late and inadequately developed below to provide the basis for a writ of certiorari" (Resp. Br. at 7). Respondents then go on to argue that in any case that not only does the Complaint state a federal claim upon which

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[2] Respondents thus overstate the import of the District Court's finding, *see* Resp. Br. 5, in order to demonstrate, somehow, that Respondents did not waive their right to argue that Defendants waived the qualified immunity issue. However, as Respondents' brief below indicates, Respondents were of the view that any affirmative defense (such as immunity) was not properly subject to litigation in advance of the filing of an answer below. Pl. Mem. in Opp. to Mot. to Dis. at 2, No. 88-0773 (D. Haw. Dec. 6, 1988). Hence, no waiver of this issue occurred.

relief may be granted, but that, if the allegations of the Complaint are proven, Petitioners will have been shown to have violated "clearly established law" (*Id.* at 10-11).

Both propositions are wrong.

First, Respondents do not deny that Petitioners, at every stage below, disputed that the Complaint stated a federal claim cognizable pursuant to the application of 42 U.S.C. § 1983 to the Hawaii Admission Act. And, as this Court held recently in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), "[a] necessary concomitant to the determination of whether the [federal] right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a [federal] right at all." *Id.* at 1793. Thus, for the reasons stated both expressly in the Petition, *see* Pet. at 17-19, and as may be discerned from the first case here on appeal, *Paty v. Napeahi*, No. 90-1937 (U.S. pet. for cert. filed June 18, 1991), *cited*, Pet. for Cert. at 2, the underlying merits of Petitioners' qualified immunity defense are concededly here to the same extent as in *Siegert*.[3]

Second, as to the precise issue whether, irrespective of the merits, Respondents have stated a claim against Petitioners that could survive qualified immunity, that issue, too, is properly before the Court. It plainly has not been waived, as the judgment in the District Court

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[3] Recognizing the impact of the *Paty* petition (No. 90-1937) to this appeal, the Department of the Attorney General has acquiesced in the filing, by Respondents here, of a brief amicus curiae bearing upon the issues in *Paty v. Napeahi*, No. 90-1937.

issued before an answer was even filed. *Compare Price v. Hawaii*, No. 91-15117, Slip Op. at 13008 (9th Cir. as amended Sept. 8, 1991) (answer is determinative pleading for preservation of defense). It is also proper that this Court consider the issue now. The issue was expressly raised in the District Court (*see* Resp. Br. at 5-7), *and*, implicitly, in Petitioners' Answering Brief in the Ninth Circuit. *See* Appellees' Ans. Br. at 35-36, No. 89-15169 (9th Cir. dated Dec. 4, 1989) ("Appellants have alleged a violation of state law only" and "there are no allegations set forth in the complaint, which if proved, would establish that Appellants' rights under the United States constitution or federal law have been infringed"). These strong arguments of necessity contain within them the narrower argument that, if any federal right at all has been alleged, it is not a clearly established one.[4] Moreover, even if the Ninth Circuit were to have been deemed to have deferred the issue of immunity to a further motion in the lower Court, the interests injured by the remand ordered below independently warrant consideration of the immunity question now, irrespective of the "pressed or passed upon below" rule. Indeed, *Siegert v. Gilley* expressly states that qualified immunity ought to have been given expeditious

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[4] Indeed, the Ninth Circuit held that, while special obligations imposed by the Hawaiian Homes Commission Act are not at issue here, the "source of the right Price asserts here is precisely the same as the source of the right claimed in *Keaukaha II*." Pet. App. 9a (citing *Keaukaha Panaewa Community Ass'n v. Department of Hawaiian Homes*, 739 F.2d 1467 (9th Cir. 1984)). To this extent, *cf. Anderson v. Creighton*, 483 U.S. 635 (1987), the Ninth Circuit has already expressly passed upon the immunity claim.

treatment in the appellate courts. *See* 111 S. Ct. at 1793. At the least, qualified immunity presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990).

Third, Respondents have no good answer to the qualified immunity defense. As an initial matter, while Respondents make much of a 1988 dispute concerning Petitioners' expenditure of public funds to determine whether all persons descended from the original inhabitants of the Hawaiian Islands should be eligible for native Hawaiian benefit programs (presently certain programs are limited by law to persons of fifty percent or more Hawaiian blood), this charge, as the Respondents' Brief admits, is nowhere in the record below, nor is the "investigative report" of the Attorney General dated November 2, 1988. *See* Resp. Br. 4-5 & nn. 1-2. Indeed, these matters were not cited anywhere in the lower court records.[5] Respondents thus virtually concede the Complaint contains no specific facts alerting Petitioners to the conduct alleged to have violated "clearly established law." Under the "heightened pleading standard" which the Petition

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[5] Respondents also fail to note that the state courts have resolved, in favor of the Trustees, an identical claim brought by other litigants. *See Kepoo v. Burgess*, No. 14770 (Haw. June 25, 1991) (Mem.), *infra*. To the extent the Respondents rely on the claim rejected in *Kepoo*, they are seeking to exacerbate the ongoing conflicts between the Ninth Circuit judgment in this case and the rulings of the state courts. *Compare, e.g., Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 174 P.2d 446, 458 (OHA has no judicially enforceable rights to 5(f) monies), *cert. denied*, 484 U.S. 898 (1987), *with* Pet. App. 6a (Respondents can show 5(f) funds must be used for them).

seeks from this Court as a general matter in cases implicating immunity, the complaint would fail.[6]

Moreover, regardless whether a heightened pleading standard is applied to the instant complaint, Respondents' have utterly failed to allege that Petitioners knowingly or recklessly violated *federal* law. *See* Pet. at 18 (citing *Davis v. Scherer*, 468 U.S. 183, 193-97 (1984)). As demonstrated in the Petition here and that in No. 90-1937, it is not a foregone certainty that Respondents even have alleged "a violation of a [federal] right at all." *Siegert, supra*, 111 S. Ct. at 1793. At the very least, there is but one answer to the "purely legal question," *id.*, whether, on the face of the complaint, qualified immunity should exist in this § 1983 action, and that is not the answer Respondents provide. For this central reason, the Petition for Certiorari should be granted as to Question 2, or the Court should grant the petition and vacate and remand for further consideration in light of *Siegert v. Gilley, supra*.

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[6] While Respondents say this Court should not grant review because the Complaint could be amended to deal with any "new rule" the Court would adopt requiring a heightened pleading standard, there is nothing, given the established protective function of qualified immunity, and the lack of any explicit precedent in the Ninth Circuit holding that heightened pleading is *not* required in immunity cases, that would require leave to amend in this case. In any event, even if leave were to be granted, the requirement of heightened pleading would minimize the costs of suit by allowing qualified immunity to be decided on a Rule 12 motion standard. *See Siegert*, 111 S. Ct. at 1793.

CONCLUSION.

For the reasons above, and in the Petition, the Petition for Certiorari and the relief it seeks should be granted.

Dated: Honolulu, Hawaii, September 23, 1991.

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APPENDIX "E"

NO. 14770

IN THE SUPREME COURT OF THE STATE OF HAWAII

ARTHUR KEPO'O, JOHN I. SIMEONA, SR., WILLIAM OILI, and RAYMOND I. KAMAKA, Plaintiffs-Appellants, vs. RODNEY K. BURGESS, III, CLARENCE F. T. CHING, ADELAIDE "FRENCHY" DESOTO, MANU KAHA 'IALI'I, MOSES K. KEALE, LOUIS HAO, THOMAS K. KAULUKUKUI, and KEVIN M. K. MAHOE, MOANIKEALA AKAKA, individually and officially as Trustees of the BOARD OF TRUSTEES, OFFICE OF HAWAIIAN AFFAIRS, STATE OF HAWAII, as a body corporate; JOHN D.WAIHEE, officially as Governor of the State of Hawaii, Defendants-Appellees.	CIV. NO. 88-2987 APPEAL FROM THE ORAL ORDER DENYING THE MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, FILED MAY 5, 1989, PER COURT MINUTES DATED JANUARY 11, 1990 FIRST CIRCUIT COURT

MEMORANDUM OPINION

(FILED JUN 25 1991)

Appellants, four Hawaiians and native Hawaiians, appeal from an Order granting appellees' Motion to Dismiss or in the Alternative for Summary Judgment. In

1988, appellees Trustees of the Office of Hawaiian Affairs sought to determine whether their constituents, the Hawaiian community, endorsed eliminating the blood quantum distinction between "Hawaiians" and "native Hawaiians" through a nonbinding mail-out referendum. Appellants contend that appellees breached their fiduciary duty to administer the special trust intended solely to better the conditions of persons with more than 50% Hawaiian blood by (1) advocating a single beneficiary class definition of "native Hawaiian," and (2) expending special trust fund monies to inform and educate the Hawaiian community about the single definition referendum.

Upon review of the record, we find no reversible error and affirm. Although not necessary in our determination of this appeal, we note our disagreement with appellees' assertion that the legislature may alter the intended purposes of the section 5(f) public trust. In creating the section 5(f) public trust, Congress directed that all proceeds of the trust were to be used for "one or more" of five statutory purposes. *See* Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). We therefore believe that the statutory purposes of the section 5(f) trust may not be changed without Congressional approval.

Affirmed.

DATED: Honolulu, Hawaii, June 25, 1991.

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